No. 3085

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. R. THOMPSON as County Treasurer of Flathead County, Montana,
Plaintiff in Error,

VS.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant in Error,

and

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

VS.

J. R. THOMPSON as County Treasurer of Flathead County, Montana,
Defendant in Error.

Brief of J. R. Thompson, Etc.

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STATEMENT OF FACTS

The statement of facts as set forth in the brief of the Northern Pacific Railway Company is satisfactory to J. R. Thompson as plaintiff in error and as defendant in error.

SPECIFICATIONS OF ERROR.

1. The District Court erred in deciding that the lands described in the first cause of action were not subject to taxation in the year of 1914.

2. The District Court erred in sustaining the Motion of the Northern Pacific Railway Company for judgment on the pleadings as to the first cause of action.

3. The District Court erred in deciding that the lands described in the second cause of action were not subject to taxation in the year of 1915.

4. The District Court erred in sustaining a Motion of the Northern Pacific Railway Company for judgment on the pleadings as to the second cause of action.

ARGUMENT

The argument in this case naturally divides itself into two main parts.

First, as to the Northern Pacific Railway Company's Specifications of error which are "that the District Court erred in deciding that the lands described in the third cause of action were subject to taxation for the year 1916."

The third cause of action differs from the first and second in this, that the survey of the lands described therein had been approved by the Commissioner of the General Land Office before the first Monday in March, 1916, as of which date they were assessed,

although the plat of survey had not, on that date, been filed in the local land office. It was held in the case of United States v. Morrison, 240 U. S. 192 36 S. Ct. Rep. 326 as follows:—

> "By order of April 17, 1879, the Commissioner required that surveyors general should not 'file the duplicate plats in the local land offices until the duplicates have been examined in this office and approved,' and theSurveyors General 'officially notified to that effect." Re. F. A. Hyde & Co., 37 Land Dec. 165. It cannot be doubted that this requirement was within the authority of the Commissioner (see Tubbs v. Wilhoit, 138 U. S. 134, 144, 34 L. ed. 887, 890, 891, 11 Sup. Ct. Rep. 279); and it necessarily follows that the making of the old survey and its approval by the Surveyor general of Oregon did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner."

The approval by the Commissioner of general land office would seem to officially complete the survey.

The case of Wells v. McHenry 74, Northwestern 241, decided squarely, the case at bar, we quote:—

> "It is urged that some of the lands within the place limits were not surveyed until after the taxes for the year 1892 had been levied, and that, therefore, such taxes are illegal so far as they affect such lands. The basis of the claim is the fact that while the survey in the field antedated the assessing and levying of the taxes, yet the plat of the survey was not filed in the local land office until after such levy had been made—They insist that these decisions establish the rule that a survey is not complete until after the plat is filed in the proper office. As we regard the mat-

> ter, these cases have no bearing on the point now under discussion. It is undisputed that the survey as made in the field was the survey which was in fact approved, and that the plat which was subsequently filed was in fact the plat of such survey. The lands being within the place limits, the grant, as soon as it attached on the filing of the plat (assuming that it did not attach before), related back to the date of the act containing the grant to the Northern Pacific Railroad Company. The grant as to place lands is a grant in praesenti, and when it attaches it becomes a grant of the land from the very day the act took effect. See Jackson v. La Moure Co., 1 N. D. 238, 46 N. W. 449, and cases cited. It therefore appears in this case that the company was the owner of the land when it was assessed and when the tax was levied. Such land having been at that time surveyed in the field, the assessor could value it, for its boundaries were then established just as they now exist and ever since have existed."

Second, we take up the question of the first and second causes of action of the complaint. As to these two causes of action, J. R. Thompson is the plaintiff in error. These two causes of action differ from the "third" in this, that the "Survey in the Field," only, was complete. The approval of the surveyor general had not been made on the first Monday in March in either of the years, 1914 or 1915 except that township 21 N. Range 15 W. and township 21 N. of Range 17 W., had on the first Monday of March 1915, been previously approved by the Surveyor General of the United States for Montana. Except as to the two

townships last mentioned, we as plaintiffs in error rely solely upon the fact that the actual **survey in the field** had been completed before the dates as of which the lands in question had been assessed.

Section 1 of the Act of Congress of July 10, 1886, provided as follows:—

"No lands granted to any railroad corporation by any act of congress shall be exempt from taxation by States, Territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor, **but this provision shall not apply to lands unsurveyed:** Provided, that any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands; provided, further, that this act shall apply only to lands situated opposite to and coterminus with completed portions of said roads, and in organized counties; provided further, that at any sale of lands under the provisions of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto. (24 Stat. 143)."

Lands conveyed to the Northern Pacific Railway Company are taxable then when they cease to be **Unsurveyed** lands within the meaning of the act.

So far as the act is concerned we are not required to discuss the question as to when land is **surveyed** or

completely surveyed nor the **plat of a survey,** the **approval of a survey** or the **filing of the plat of a survey** except as such discussion is incidental to the discussion of the intention of Congress when it used the term unsurveyed.

> "In the interpretation of statutes words are to be construed in their natural plain and ordinary significance. It is a very well settled rule that so long as the language used is not ambiguous no departure from its natural meaning is justified, etc." (36 Cyc. 1114. See also 23 Am. and Eng. Ency. Law page 298.

Meaning of term Surveyed:

> "To determine the form, extent, position, etc. of, as a tract of land, coast, harbor, or the like by means of linear and angular measurements and the application of the principles of geometry and trigonometry; as, to survey lands or coasts." (Webster's International Dictionary, 1894 comprising issues 1864, 1879-84).

In Muse v. Arlington 68 Fed. 641, the court says:—

> "The actual survey consisted of 'running lines with compass and chain, establishing corners, marking tree and other objects on the ground, giving bearings and distances, and making field notes and plats of the works. These are the ingredients of an actual survey.' Quoting Winter v. U. S. Hempst. 362, Fed. Cas. No. 17, 895."

If we give to the statute its natural and ordinary meaning, Northern Pacific lands granted under the act of 1864 are taxable when the survey in the field has been made and on such construction the Treasurer of Flathead County is entitled to judgment on

the first and second causes of action as well as on the third.

There are exceptions to the last discussed rule which might properly be considered here:

TECHNICAL TERMS

> "Terms of art, or technical words and phrases used in a statute, and such others as may have acquired a peculiar and appropriate meaning in the law must be interpretated in accordance with their received meaning and acceptation with the learned in the art, trade, or profession to which they belong, unless it clearly appears from the context or otherwise, that it was the intention of the legislature to use them in a different sense." (36 Cyc. 1118.)

Had the term surveyed, then, in 1886 acquired in law or even in the land department any extraoardinary meaning?

An examination of land office orders will show that even the ordinary meaning that we contend for, was of such force, that qualifying words must be carefully inserted, before the meaning contended for by the Northern Pacific Railway Co., in their Brief would be at all apparent. They used the terms **"approved plat of the survey,"** "there must be posted forthwith a notice specifying the township **that has been surveyed,"** "plat of the survey will be filed," etc. (See Brief of Northern Pacific Railway Co., page 9 quoting from general land office, circular of January 25, 1904) "Survey was accepted (by a Commissioner of general land office) for payment only," "Survey in

the field," "officially complete survey" (The foregoing expressions are taken from the Morrison case Supra which was decided in February, 1916). The term survey had not at that time acquired any peculiar significance in law it would seem. Much less had it acquired any such significance in 1886.

The proper construction of the act in question, if indeed construction is required to determine its meaning, must be made in the light of conditions existing at the time of the act of July 2, 1864. The Northern Pacific Railroad Co., had been granted certain lands of which the lands taxed in this case were a part.

> "The words in that Act 'that there be and hereby is granted' are words of absolute donation and import a grant in praesenti." (Leavenworth R. R. C. v. U. S. 92 United States, 741, 23 L. Ed. 637)

There was, however, enacted in 1870 the following:

> "That before any land granted to said Company by the United States shall be conveyed to any party entitled thereto under any of the Acts incorporating or relating to said Company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the Company or party in interest." (16 Stat. at L., p. 305.)

It was decided by the United States Supreme Court that by virtue of such act,

> "The government was, as to these costs, in the condition of a trustee in a conveyance to secure payment of money. But, if the land was liable to be sold for taxes due to state, territorial or county organiations, this security would be easily

lost." Northern Pacific R. R. Co., v. Rockery 115 U. S. 600, Bk. 29, p. 480.

"We are aware of the use being made of this principle by the companies, who, having earned the lands, neglect to pay these costs in order to prevent taxation The remedy lies with Congress and is of easy application. If that body will take steps to enforce its lien for these costs of survey, by sale of the lands or by forfeiture of title, the Treasury of the United States would soon be reimbursed for its expenses in making the surveys, and the States and Territories, in which the lands lie, be remitted to their appropriate rights of taxation. The courts can do no more than declare the law as it exists." (Northern Pacific R. R. Co., v. Rockney 115 U. S. 600 Bk. 29, p. 480.)

In the July following the foregoing opinion which was handed down December 7, 1885, Congress passed the act under discussion.

There was inserted in the Act the words "but this provision shall not apply to lands unsurveyed." Those words, it would seem, added nothing except to emphasize the fact that Congress was not abrogating the common law rules that "before lands are taxable they must be capable of definite description."

We quote from State v. Central Railway Co. (Supreme Court of Nevada) 25 Pac. 443. In commenting on the act of July 10, 1886, they say:—

"A reason for witholding the right to tax unsurveyed lands may be found in the fact that it is impracticable to assess them. ..It is a well established principle of law that land assessed for the purpose of taxation must be so described that it may be identified. The purposes of this require-

ment, as stated by Judge Cooley, are—'First, that the owner may have information of the claim made upon him or his property; second, that the public, in case the tax is not paid, may be notified what land is to be offered for sale for the non-payment; and, third, that the purchaser may be enabled to obtain a sufficient conveyance.' (Cooley, Tax'n 284.)"

"The exemption enforces the principle that lands may not be assessed for taxation unless described so that they may be found."

And in Wells v. McHenry (supra):—

"It therefore appears in this case that the company was the owner of the land when it was assessed and when the tax was levied. Such land having at that time been surveyed in the field, the assessor could value it, for its boundaries were then established just as they now exist.---------The lands being within the place limits, the grant, as soon as it attached on the filing of the plat (assuming that it did not attach before) related back to the date of the act containing the grant to the Northern Pacific Railroad Company. The grant as to place lands is a grant in praesenti, and when it attaches it becomes a grant of the land from the very day the act took effect." (See Jackson v. La Moure Co. 1 N. D. 238, 46 N. W. 449.)

The doctrine of relation meets no such objection in the case at bar as in the Morrison case (supra) for the reason that this is a case of a grant in praesenti, and that, the case of a grant taking effect on the completion of the survey.

IN CONCLUSION WE RESPECTFULLY submit that as to the third cause of action the survey was officially complete before the lands were assessed. Con-

gress intended to use the term survey in its ordinary meaning and intended to re-assert the common law doctrine, that, to be taxable, lands must be capable of definite description. On the approval of the plat by the commissioner of the general land office the lands received a taxable status by the doctrine of relation back as of the date they were surveyed in the field and at which time the assessor could determine their location.

That the judgment of the District Court should be affirmed as to the third cause of action and overruled as to the first and second and that the County Treasurer should have judgment on all causes of action.

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